

Exhibit 5-I

GMACM Demurrer

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10 Attorneys for Defendants
11 GMAC MORTGAGE, LLC; and
12 OCWEN LOAN SERVICING, LLC

12 SUPERIOR COURT OF CALIFORNIA
13
14 COUNTY OF LOS ANGELES — WEST DISTRICT
15
16 SANTA MONICA COURTHOUSE

15 FRANCINE SILVER,

16 Plaintiff,

17 vs.

18 GMAC MORTGAGE, LLC, a limited liability
19 company; OCWEN LOAN SERVICING,
20 LLC; and DOES 1-20,

21 Defendant.

Case No. SC118412
Assigned for All Purposes to:
Hon. Allan J. Goodman
Dept. WE "P"

DEFENDANT GMAC MORTGAGE,
LLC'S NOTICE OF DEMURRER;
DEMURRER TO SECOND AMENDED
COMPLAINT; AND MEMORANDUM OF
POINTS AND AUTHORITIES

Date: May 14, 2015
Time: 8:30 a.m.
Crtn.: WE "P"

Action Filed: September 17, 2012
Trial Date: None Set

19000.1384/3258733.1

NOTICE OF AND SUBMISSION TO COURT

1 ROBERT J. GANDY (State Bar No. 225405)

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES — WEST DISTRICT

SANTA MONICA COURTHOUSE

FRANCINE SILVER,

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company; OCWEN LOAN SERVICING,
LLC; and DOES 1-20,

Defendant.

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1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on May 14, 2015, at 8:30 a.m., or as soon thereafter as
3 counsel may be heard, in Department P of the Los Angeles County Superior Court, the Honorable
4 Allan J. Goodman presiding, located at 1725 Main Street, Santa Monica, California 90401,
5 defendant GMAC Mortgage, LLC ("GMAC") demurs to the second amended complaint ("SAC")
6 of plaintiff Francine Silver and to each cause of action asserted against GMAC.

7 The demurrer is made pursuant to Code of Civil Procedure section 430.10(e) on the ground
8 that plaintiff's SAC fails to state facts sufficient to constitute any cause of action against
9 Defendants.

10 The demurrer is based on this notice and demurrer, the memorandum of points and
11 authorities, the request for judicial notice, the SAC, and all other papers filed in this action.
12

13 DATED: May 21, 2014

SEVERSON & WERSON
A Professional Corporation

14
15
16 By:


DAVID M. LIU

17
18 Attorneys for Defendants
19 GMAC MORTGAGE, LLC; and
20 OCWEN LOAN SERVICING, LLC
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DEMURRER TO SECOND AMENDED COMPLAINT

Demurrer to the First Cause of Action

1. GMAC demurs to the first cause of action on the ground that it fails to state facts sufficient to constitute a cause of action. *See* Code Civ. Proc. § 430.10(e).

DATED: May 21, 2014

SEVERSON & WERSON
A Professional Corporation

By:


DAVID M. LIU

Attorneys for Defendants
GMAC MORTGAGE, LLC; and
OCWEN LOAN SERVICING, LLC

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Francine Silver brings this action against defendants GMAC Mortgage, LLC ("GMAC") to argue that GMAC has no right to foreclose on real property after plaintiff defaulted on a residential loan.

Plaintiff's first theory to support this proposition is that the subject loan was placed in a Pooling and Servicing Agreement and, thus, GMAC may not foreclose on the Property. This theory does not hold water. As detailed below, the fact that a loan may be placed in such an agreement does not negate the creditor's right to foreclose. Further, plaintiff lacks standing to sue for a breach of the agreement as she is neither a party nor beneficiary to the agreement.

Plaintiff also argues that GMAC cannot foreclose because Mortgage Electronic Registration Systems, Inc. ("MERS") has no interest in the property and cannot assign the loan to another creditor. But, plaintiff agreed in the loan documents that MERS was a beneficiary of the loan. Moreover, California law provides that MERS may act to foreclose on property and may assign any interest in the loan to another creditor.

Plaintiff has taken out nearly \$1.5 million in loans on the residence and, having defaulted, is trying any avenue to stall a foreclosure on the property. But as noted in this demurrer, all of plaintiff's theories to stall the foreclosure have no basis in the law. Accordingly, the demurrer should be sustained without leave to amend.

II. FACTUAL BACKGROUND

In a deed of trust, dated March 15, 2006, plaintiff and non-party Nationwide Lending Group, entered into a loan agreement whereby Nationwide Lending loaned plaintiff \$1.3 million (the "First Deed of Trust") which was secured by real property located at 8613 Franklin Avenue, Los Angeles, California 90069 (the "Property"). See Ex. 1 to Defendants' Request for Judicial Notice ("RJN").

On March 17, 2006, plaintiff deeded her rights to the Property to "The Leslie and Francine Silver Living Trust, UTD, Sept. 8, 1999, Francine Silver Trustee" (the "Trust"). See Ex. 2 to RJN.

1 In another deed of trust, dated September 7, 2007, plaintiff obtained a subsequent loan
2 from JPMorgan Chase Bank for \$170,000 which was also secured by the Property. *See* Ex. 3 to
3 RJN.

4 On July 5, 2011, the First Deed of Trust was assigned to GMAC Mortgage, LLC (fka
5 GMAC Mortgage Corporation). *See* Ex. 4 to RJN.

6 On July 6, 2011, the trustee on the First Deed of Trust became Executive Trustee Services,
7 LLC dba ETS Services, LLC. *See* Ex. 5 to RJN.

8 Plaintiff defaulted on the First Deed of Trust and a notice of default was recorded on the
9 Property on July 22, 2011. *See* Ex. 6 to RJN.

10 Plaintiff failed to cure the default and a notices of trustee's sale for the First Deed of Trust
11 were recorded on the Property on October 5, 2012. *See* Ex. 7 to RJN.

12 On March 25, 2013, the First Deed of Trust was assigned to U.S. Bank National
13 Association, as Trustee for Greenpoint Mortgage Funding Trust Mortgage Pass-Through
14 Certificates, Series 2006-AR7. *See* Ex. 8 to RJN.

15 **III. ARGUMENT**

16 **A. Standard On Demurrer**

17 For the purposes of testing the sufficiency of the pleadings, the demurrer assumes the truth
18 of the well-pleaded factual allegations of the complaint. *See City of Dinuba v. County of Tulare*,
19 41 Cal. 4th 859, 865 (2007). A demurrer does not, however, assume the truth of "contentions,
20 deductions or conclusions of fact or law." *Blank v. Kirwan*, 39 Cal. 3d 311, 318 (1985); *see also*
21 *Aubry v. Tri-City Hosp. Dist.*, 2 Cal. 4th 962, 967 (1992).

22 Additionally, a demurrer may be based on matters appearing on the face of a complaint or
23 on matters of which the court is required or requested to take judicial notice. *See* Code Civ. Proc.,
24 § 430.30(a). The Court may consider the contents of any documents attached as exhibits to the
25 complaint. *See Frantz v. Blackwell*, 189 Cal. App. 3d 91, 94 (1987). To the extent allegations in
26 the complaint contradict such exhibits, courts "rely on and accept as true the contents of the
27 exhibits...." *Barnett v. Fireman's Fund Insurance Co.*, 90 Cal. App. 4th 500, 505 (2001).

**B. Plaintiff's First Claim For Declaratory Relief Fails Because She Lacks
Standing To Sue For Any Alleged Violation Of A Pooling And Servicing
Agreement And Any Such Agreement Does Not Negate GMAC's Right To
Foreclose On The Property**

**1. An Actual And Present Controversy Must Exist To Support A
Declaratory Relief Claim**

California Code of Civil Procedure section 1060 allows any person "[i]nterested under a written instrument, excluding a will or trust, or under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property..." to seek a judicial declaration of his, her, or its rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract.

California Code of Civil Procedure section 1061 provides that the court may refuse to exercise the power to grant declaratory relief in any case in which its declaration or determination is not necessary or proper at the time under all the circumstances.

The purpose of declaratory relief is to eliminate uncertainties that may result in future litigation, and, hence, to quiet or stabilize an uncertain or disputed legal relations by permitting a prompt adjudication of the respective rights and obligations of the parties. *See Marina Development Co. v. County of Los Angeles*, 155 Cal. App. 3d 435, 443 (1984); *City of Tiburon v. Northwestern Pac. R.R. Co.*, 4 Cal. App. 3d 160, 173 (1970); *Lortz v. Connell*, 273 Cal. App. 2d 286, 301 (1969). Declaratory relief enables the parties to shape their future conduct to avoid the breach of an obligation. *See Babb v. Superior Court of Sonoma County*, 3 Cal. 3d 841, 848 (1971).

An action for declaratory relief is authorized only when an actual controversy relating to the legal rights and duties of the respective parties exists. *See Cal. Civ. Proc. Code § 1060*. A justiciable controversy must be definite, concrete, and touching the legal relations of parties having adverse interests. *See LePage v. Oakland*, 13 Cal. App. 3d 689, 692 (1970). When only past wrongs are involved there is no basis for declaratory relief. *See County of San Diego v. State* 164 Cal. App. 4th 580, 607-608 (2008).

1 Declaratory relief is superfluous if another cause of action would resolve the alleged
2 dispute. "The object of the [declaratory relief statute] is to afford a new form of relief where
3 needed and not to furnish a litigant with a second cause of action for the determination of identical
4 issues." *Hood v. Superior Court*, 33 Cal. App. 4th 319, 321-324 (1995).

5 **2. Declaratory Relief Is Not Necessary Because Plaintiff Cannot Show**
6 **That Any Actual And Present Controversy Exists Regarding The**
7 **Foreclosure**

8 Plaintiff alleges at length that Defendants have no authority to foreclose on the Property
9 because the loan was securitized through a Pooling and Service Agreement ("PSA"). See SAC, ¶¶
10 6 to 10. However, the securitization is not attached to the SAC which shows that the subject loan
11 is part of the alleged securitization.

12 And in any event, this contention was recently rejected in *Jenkins v. JP Morgan Chase*
13 *Bank*, which held that a borrower was not a party to the securitization and could not complain if
14 there was a problem with the securitization. "As an unrelated third party to the alleged
15 securitization, and any other subsequent transfers of the beneficial interest under the promissory
16 note, Jenkins lacks standing to enforce any agreements, including the investment trust's pooling
17 and servicing agreement, relating to such transactions." *Jenkins v. JP Morgan Chase Bank, N.A.*,
18 216 Cal. App. 4th 497, 515 (2013). Even if there were problems with the securitization, the
19 borrower still had the obligation under the note and deed of trust to repay the loan. See *id.*

20 Courts have rejected claims that companies lose their power of sale pursuant to the deed of
21 trust when the original promissory note is securitized and assigned to a trust pool. See *Benham v.*
22 *Aurora Loan Servs.*, 2009 WL 28880232, *3 (N.D. Cal. 2009); *Hafiz v. Greenpoint Mortg.*
23 *Funding, Inc.*, 652 F.Supp.2d 1039, 1043 (N.D. Cal. 2009); *Mulato v. WMC Mortg. Corp.*, 2010
24 WL 1532276, at *2 (N.D. Cal. 2010).

25 Courts have also rejected the notion that the securitization of a loan results in the
26 separation of the note and deed of trust which would allegedly prohibit foreclosure on the
27 Property. See *Christopher v. First Franklin Fin'l Corp.*, 2010 WL 1780077, at ** 2-3 (S.D. Cal.
28 2010); *Labra v. Cal-Western Reconveyance Corp.*, 2010 WL 889537, at ** 12-15 (N.D. Cal.

1 2010); *Saxon Mortg. Services v. Hillery*, 2009 WL 2435926, at ** 4-5 (N.D. Cal. 2009).

2 Further, plaintiff does not have standing to challenge the securitization of the loan and
3 whether the loan was properly transferred in accordance with the Pooling and Servicing
4 Agreement, as plaintiff has failed to demonstrate she is a party or beneficiary to the Pooling and
5 Servicing Agreement. See *Christopher v. First Franklin Fin. Corp.*, 2010 WL 3895351, at *4
6 (S.D. Cal. Sept. 29, 2010); *Armeni v. Am.'s Wholesale Lender*, 2012 WL 603242, at *3 (C.D. Cal.
7 Feb. 24, 2012) ("The Court finds that plaintiff lacks standing to challenge the process by which his
8 mortgage was (or was not) securitized because he is not a party to the PSA."); *Armstrong v. Chevy*
9 *Chase Bank, FSB*, 2012 WL 4747165, at *2-*3 (N.D. Cal. Oct. 3, 2012) ("Plaintiffs theory of
10 liability fails to support a plausible claim because Plaintiffs lack standing to allege a breach of the
11 PSA. Indeed, they are neither direct parties to nor third-party beneficiaries of that agreement.").

12 Thus, the theory that the PSA prevents a foreclosure lacks merit. That plaintiff's loan may
13 have been securitized and governed by a pooling and servicing are not grounds to invalidate the
14 loan on the Property. The motion should be granted without leave to amend.

15 **3. MERS May Foreclose On The Property And Assign The Deed Of Trust**

16 Plaintiff further alleges that Defendants had no rights under the Deed of Trust to foreclose
17 on the Property. This contention is not supported by the law. "California courts have refused to
18 delay the nonjudicial foreclosure process by allowing trustor-debtors to pursue preemptive judicial
19 actions to challenge the right, power, and authority of a foreclosing "beneficiary" or beneficiary's
20 "agent" to initiate and pursue foreclosure." *Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal.
21 App. 4th 497, 511 (2013). Thus, plaintiff has no standing to sue to challenge Defendants' right to
22 foreclose on the Property.

23 Plaintiff alleges that MERS has no interest in the subject loan and could not assign the
24 loan. See SAC, ¶¶ 11 to 15. Plaintiff's conclusory allegation that MERS could not foreclose on
25 the Property or assign the loan is not supported by the law. As held in *Gomes v. Countrywide*
26 *Home Loans, Inc.*, 192 Cal. App. 4th 1149, 1151 (2011) ("*Gomes*"), the purpose of MERS is:

1 MERS is a private corporation that administers the MERS System, a national
2 electronic registry that tracks the transfer of ownership interests and servicing
3 rights in mortgage loans. Through the MERS System, MERS becomes the
4 mortgagee of record for participating members through assignment of the
5 members' interests to MERS. MERS is listed as the grantee in the official
6 records maintained at county register of deeds offices. The lenders retain the
7 promissory notes, as well as the servicing rights to the mortgages. The lenders
8 can then sell these interests to investors without having to record the
9 transaction in the public record. MERS is compensated for its services through
10 fees charged to participating MERS members.

11 The *Gomes* court held that the rules governing non-judicial foreclosure [Civil Code
12 sections 2924 *et seq.*] were the *only* rules governing non-judicial foreclosure. *See id.* at 1154.
13 Thus, a plaintiff cannot seek a judicial determination that MERS could not foreclose on real
14 property.

15 Further, plaintiffs agreed in the deed of trust that MERS was the nominal beneficiary and
16 could non-judicially foreclose upon plaintiffs' default on the loan. *See id.* at 1157. The *Gomes*
17 decisions was affirmed in *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 258, 268-73
18 (2011) ("*Fontenot*"). In *Fontenot*, the court stated that the *Gomes* decision was rightly decided.
19 *See id.*

20 Further, the *Fontenot* court held that a plaintiff bore the burden of establishing that any
21 assignment to MERS was improper because plaintiff was challenging the propriety of the
22 foreclosure proceedings. *See id.* The court also held that MERS, as nominee for the lender, could
23 assign a note as an agent for the lender. *See id.* Furthermore, simply alleging that as assignment
24 is improper is not enough – plaintiff must establish that there was absolutely no assignment of the
25 note and deed of trust to the foreclosing lender. *See id.* Here, there are two recorded assignments
26 of the First Deed of Trust which show the Defendants' rights to foreclose.

27 Here, like in *Gomes*, plaintiff agreed in the First Deed of Trust that MERS was a nominee
28 and beneficiary for the loan. *See Ex. 1 to RJN*, page 1. In short, MERS may act as a beneficiary
under a deed of trust and may, in that capacity, commence non-judicial foreclosure based upon the
borrowers' default.

1 Furthermore, even if any of the assignments were improper, plaintiff must show how she
2 was prejudiced. "Prejudice is not presumed from 'mere irregularities' in the process." *Herrera v.*
3 *Federal National Mortgage Association*, 205 Cal. App. 4th 1495, 1507-1508 (2012). Any error in
4 assignments do not damage the borrower, but the lender. *See id.* at 1508.

5 The weight of California state authority -- *Gomes*, *Fontenot*, and *Jenkins* -- show that
6 plaintiff does not have a right to challenge the completed foreclosure on the Property. The
7 holdings in *Jenkins*, *Gomes*, *Fontenot* and *Herrera* were also affirmed in *Siliga v. Mortgage Elec.*
8 *Registration Sys., Inc.*, 219 Cal. App. 4th 75, 85 to 86 (2013).

9 Plaintiff allèges that Jacqueline Keeley was not an authorized signatory for the assignment
10 of the deed of trust. *See* SAC, ¶ 15. This theory fails because plaintiff must allege that there was
11 absolutely no assignment of the note and deed of trust but plaintiff failed to do so.

12 **4. Exhibit "A" Attached To The SAC Should Be Disregarded As It Is Not**
13 **Authenticated And Is Irrelevant**

14 The bankruptcy court order (attached as Exhibit A) is irrelevant to the allegations in the
15 SAC. "[F]ederal decisional authority is neither binding nor controlling in matters involving state
16 law." *Howard Contracting, Inc. v. G.A. MacDonald Constr. Co., Inc.*, 71 Cal. App. 4th 38, 52
17 (1998). Thus, what the bankruptcy court may have found is not controlling on plaintiff's state-law
18 claim for declaratory relief.

19 Also, the Court should not take judicial notice of the purported facts stated in the order.
20 "[W]hile courts are free to take judicial notice of the existence of each document in a court file,
21 including the truth of results reached, they may not take judicial notice of the truth of hearsay
22 statements in decisions and court files. [Citation.] Courts may not take judicial notice of
23 allegations in affidavits, declarations and probation reports in court records because such matters
24 are reasonably subject to dispute and therefore require formal proof." *Kilroy v. State*, 119 Cal.
25 App. 4th 140, 145 (2004) (citation omitted). Thus, the Court may take judicial notice that the
26 order was issued, but the Court should not take judicial notice of facts found by the bankruptcy
27 court because, as stated in the order, it relied on declarations. *See id.* As stated in *Kilroy*,
28 "[f]indings in a prior judicial opinion are not a proper subject of judicial notice." *Id.* at 148.

1 Furthermore, plaintiff alleges that GMAC does not have standing to foreclose based on the
2 loan being assigned to a pooling and servicing agreement. This has nothing to do with the
3 signatures discussed in the order. Plaintiff also alleges that, as a general principle, MERS has no
4 right to foreclose because it is not a beneficiary of the loan and cannot assign loans. Again, this
5 has nothing to do with the signatures discussed in the order.

6 Hence, the Bankruptcy Court order is irrelevant and is not subject to judicial notice.

7 **IV. CONCLUSION**

8 For the foregoing reasons, Defendants respectfully requests the Court to grant the motion
9 for judgment on the pleadings, without leave to amend.

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11 DATED: May 21, 2014

SEVERSON & WERSON
A Professional Corporation

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By:


DAVID M. LIU

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Attorneys for Defendants
GMAC MORTGAGE, LLC; and
OCWEN LOAN SERVICING, LLC

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PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Orange, State of California. My business address is The Atrium, 19100 Von Karman Avenue, Suite 700, Irvine, CA 92612.

On May 21, 2014, I served true copies of the following document(s): **DEFENDANT GMAC MORTGAGE, LLC'S NOTICE OF DEMURRER, DEMURRER TO SECOND AMENDED COMPLAINT; AND MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action as follows:

Ehud Gersten, Esq.
GERSTEN LAW GROUP
3115 Fourth Avenue
San Diego, CA 92103

Attorneys for Plaintiff FRANCINE SILVER

Telephone: (619) 600-0098
Email: egersten@gerstenlaw.com

- ☒ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Severson & Werson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
- ☐ **BY CERTIFIED MAIL - RETURN RECEIPT REQUESTED:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing via Certified Mail, Return Receipt Requested, following our ordinary business practices. I am readily familiar with Severson & Werson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
- ☐ **BY FEDEX:** I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 21, 2014, at Irvine, California.


RYAN J. BROOKS